CROSS-CLASS CRAMDOWNS IN SINGAPORE AND LESSONS FROM THE UK

In 2017, a cross-class cramdown mechanism was introduced into the Singapore framework for corporate rescues. The new mechanism allows the court to bind all creditors to a compromise, even if entire classes of creditors object. While available for years, there is still no reported judgment on the mechanism. This is in contrast to the burgeoning jurisprudence on the UK cross-class cramdown mechanism, which was introduced in 2020 under Pt 26A of the UK Companies Act 2006. In anticipation of the first Singapore judgment on this topic, this article analyses the substantive requirements and safeguards for a cross-class cramdown in Singapore, and attempts to draw some guidance from the latest UK decisions.

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I. Introduction

1 In Singapore, prior to fairly recent legislative amendments, dissenting creditors could only be bound by a court-sanctioned scheme of arrangement[2] and therefore "crammed down", if the scheme is approved by a majority in number, representing three-fourths in value, of creditors present and voting in each class of creditors. As with several Commonwealth jurisdictions, creditors whose legal rights are so dissimilar to each other that they cannot sensibly consult together with a view to their common interest must vote in different classes.[3] Approval thresholds must be met in every class of creditors, before the court can consider whether to sanction the scheme. The overall goal of classification and approval thresholds is to ensure fairer representation of creditors, and to mitigate the prospect of a majority of creditors dominating a minority with different legal rights.

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1 The author thanks Wesley Chai Yui-Kai for his assistance in conducting research for the drafting of this article. All errors are the author's alone.
2 For brevity, a compromise or arrangement proposed under Singapore's restructuring and insolvency legislation will be referred to as a "scheme" in this article.
3 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213.

2 That said, the requirement to form separate classes of creditors, and the need to meet approval thresholds in each class, can present a significant obstacle for corporate rescues. Creditors are certainly entitled to reject a scheme for any reason. However, inefficiencies can arise when minority dissenters tactically hold out to extract more value for themselves, at the expense of an otherwise viable scheme. This is exacerbated if the dissenters are "out of the money" creditors, being unsecured, junior or subordinated creditors who would not be entitled to any recovery if the scheme is rejected and the debtor goes into insolvent liquidation. The obvious inefficiency is that such "out of the money" creditors (who have nothing to lose if the debtor goes into liquidation) would effectively be holding senior creditors, the debtor and the debtor's members to ransom when bargaining for better terms.

3 Some known strategies by dissenters to maximise their veto powers include pushing for a separate class for themselves, buying blocking stakes and increasing their numerical headcounts by assigning parts of their claims to other like-minded or even related creditors. Sophisticated creditors have also been known to take out credit default swap instruments, which pay out if the debt restructuring fails – thereby incentivising the debtor's collapse. To be clear, there is nothing inherently disagreeable with such tactics. Various US Circuit Courts have accepted in principle that creditors can buy claims and vote on them in good faith, even if done solely to accumulate a blocking stake.[4] Likewise, the Singapore Court of Appeal has also observed that assigning debts with a view towards meeting approval thresholds can be part of a lawful and routine commercial transaction.[5] However, such tactical manoeuvring by dissenters can make a corporate rescue costlier and more difficult to implement.

4 Likewise, the formation of creditor classes is also open to some level of gamesmanship by debtors. Traditionally, debtors would be motivated to create as large a voting class as possible, so as to dilute the votes of a dissenting minority. Classification must first be resolved, before creditors can even vote on a scheme. Disputes on classification can therefore create a choke point that holds up a corporate rescue, when time is of the essence. Any delays, or even the market's perception that a debtor's scheme proceedings will be beset by contentious litigation

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4 See, *eg*, Lawrence B Gutcho & David A Fidler, "Purchasing Claims to Block Bankruptcy 'Cramdown' Plans: A New Weapon for Creditors" (1998) 115(1) *Banking Law Journal* 4.

5 See *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898 at [78].

at each stage, will often turn otherwise amenable creditors against the debtor's rescue plans.

5 This article will first describe the cross-class cramdown mechanism in Singapore, which was introduced in 2017 to address the above issues. As the UK introduced a broadly similar mechanism in 2020, this article will then compare the two mechanisms, analyse the substantive requirements and safeguards of the Singapore mechanism, and seek to draw guidance from the latest UK jurisprudence. In doing so, this article will discuss the role of class formation in a cramdown, when discrimination between classes might be unfair, the indicia for whether a scheme is fair and equitable to a dissenting class and briefly touch on the different perspectives on cramming down members.

II. Cross-class cramdowns in Singapore

6 The statutory framework in Singapore has been amended a number of times in recent years to address issues relating to creditor classification and approval thresholds for schemes.

7 In 2014, the Companies Act was amended to calibrate members' and creditors' rights to dissent to a debtor's proposed scheme. While the previous statutory provision required a "majority in number" of members or creditors to meet headcount requirements for approving a scheme, the Companies (Amendment) Act 2014[6] added the words "unless the Court orders otherwise" before the words "majority in number" in what is now s 210(3AB) of the Companies Act 1967.[7] However, the value requirement remained intact.

8 This meant that the court now had discretion to disapply the headcount requirement of a majority in number of creditors, if larger creditors representing three-fourths in value of debt supported the scheme. The practical effect is that there is now a statutory workaround, if a scheme is blocked by numerous creditors with relatively small debts.

9 Despite being in force since 2016, there are no reported decisions where a debtor has specifically invited the Singapore court to disapply the headcount requirement via s 210(3AB) of the Companies Act 1967. There may be two possible reasons for this. The first is that the tactic of vote-splitting by creditors to create a numerical majority may not

6 Act 36 of 2014. The Companies (Amendment) Act 2014 came into effect on 3 January 2016.

7 2020 Rev Ed.

be particularly prevalent in Singapore restructurings. The second, and perhaps likelier reason, is that debtors can and often do overcome headcount requirements by simply paying off smaller creditors in full, thereby excluding them from their schemes altogether.

10 Against this backdrop, a slightly different approach was taken in *Re Zipmex Pte Ltd*.[8] In that case, the Singapore High Court invoked s 210(3AB) without being addressed on it by parties, to allow an "administrative convenience" class of nearly 70,000 small creditors to be excluded from voting. This was to relieve the debtor from the administrative burden and cost of soliciting votes from a large quantity of small creditors. Importantly, the condition was that such creditors could vote if they wished to do so. They would also receive the same benefits as any other unsecured creditor, if the scheme was sanctioned. The small creditors were therefore not prejudiced by the court's disapplication of headcount requirements.

11 In any event, the power to disapply headcount requirements in s 210(3AB) of the Companies Act 1967 only partially addressed the issue of smaller, individual creditors *within* a class holding out to extract benefits. It has no utility where (as in most cases) there is more than one class of creditors, and an entire class of dissenting creditors vetoes the scheme. If so, preliminary disputes on creditor classification would still be a significant choke point, that needs to be cleared before the court will allow a scheme meeting to be called.

12 The entire statutory framework for schemes, judicial management and cross-border insolvency was significantly upgraded in 2017 by way of the Companies (Amendment) Act 2017.[9] As part of the suite of legislative amendments, cross-class cramdowns were added to the corporate rescue toolbox through s 211H of the Companies Act. The provisions were then carried over with some modifications into s 70 of the omnibus Insolvency, Restructuring and Dissolution Act 2018[10] ("IRDA"), which came into force on 30 July 2020.

13 The provisions on cross-class cramdowns stemmed from the Insolvency Law Review Committee's ("ILRC") recommendations in its landmark 2013 final report on insolvency and restructuring law reform[11] ("Final Report"). Specifically, the ILRC considered that: (a) a minority of

8 [2023] SGHC 88.
9 Act 15 of 2017.
10 2020 Rev Ed.
11 Insolvency Law Review Committee, *Final Report* (2013) (Chairman: Lee Eng Beng SC).

dissenters should not be able to veto a scheme merely because they are in a separate class, provided that they are treated fairly in the proposed scheme; (b) where dissenters get at least as much under the scheme as they would in liquidation, and are not otherwise discriminated against, they cannot complain that the scheme is unreasonably imposed on them; and (c) a cross-class cramdown mechanism would help avoid excessive emphasis on the creditor classification exercise in the early stages of scheme proceedings.[12]

14 The present cross-class cramdown provisions in s 70 of the IRDA draw heavily from their US Chapter 11 equivalents,[13] with some local modifications.[14] These new provisions are a significant upgrade to Singapore's corporate rescue regime, as they now allow the court to approve a scheme, even if headcount and value requirements cannot be met in one or more *classes* of creditors (hence, a cramdown across classes). Entire classes of dissenting creditors can now be bound, if four conditions exist:

(a) first, creditors have voted on the debtor's proposed scheme at a scheme meeting;[15]

(b) second, creditors meant to be bound by the scheme are placed in two or more classes of creditors for the purposes of voting on the scheme;[16]

(c) third, the approval thresholds (*ie*, relating to headcount and value) must be met in at least one class of creditors;[17] and

(d) fourth, either or both of the headcount and value requirements are not met in at least one class of creditors, being the dissenting class.[18]

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12 Insolvency Law Review Committee, *Final Report* (2013) (Chairman: Lee Eng Beng SC) at para 49.

13 See in particular § 1129 of the US Bankruptcy Code, which provides that the court can override a dissenting class of creditors and confirm a Chapter 11 reorganisation plan if certain standards of fairness are met, as long as at least one impaired class of creditors accepts the plan. One of the determinants of fairness is if the dissenting class either receives more under the plan than they would in liquidation, or would have received nothing under the plan.

14 The main differences are in the approval thresholds (Chapter 11 cramdown provisions require only approval from a majority in number representing two-thirds in value of claims in that class), the standards of fairness required for a cramdown, and the ability in a Chapter 11 cramdown to vary rights of shareholders against their will.

15 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(1)(*a*).

16 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(1)(*b*).

17 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(1)(*c*).

18 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(1)(*d*).

15 If the above four conditions exist, ss 70(3)(*a*) to 70(3)(*c*) of the IRDA provide that the court has discretion to approve a scheme and bind all creditors in a dissenting class, if:

(a) in total, all creditors meant to be bound (regardless of class) have approved the scheme by a majority in number, representing three-fourths in value of the debt;[19] and

(b) the court is satisfied that the scheme does not discriminate unfairly between two or more classes of creditors, and is fair and equitable to each dissenting class.[20]

16 Section 70(3)(*c*) of the IRDA therefore imposes a twin requirement of internal and inter-class fairness. Even if a scheme is fair and equitable to each dissenting class, the court must also be satisfied that it does not discriminate unfairly *between* classes.

17 Section 70(4) of the IRDA goes on to provide that a scheme is not fair and equitable to a dissenting class, if any creditor in that class will receive, under the terms of the scheme, an amount that is lower than what he is estimated by the court to receive in the most likely scenario if the scheme does not become binding.[21] Further, if creditors in the dissenting class are secured creditors, each creditor in that class must receive under the proposed scheme: (a) deferred cash payments totalling the amount of its secured asset, and preservation of that security; (b) a charge over proceeds of realisation, if the secured asset is to be realised; or (c) the "indubitable equivalent" of the secured asset.[22] If creditors in the dissenting class are unsecured creditors, the terms of the scheme: (i) must provide for each creditor in that class to receive property of a value equal to the amount of the creditor's claim; or (ii) must not provide for any junior or subordinate creditor to receive or retain any property of the company.[23] The latter requirement in particular is adapted from the "absolute priority rule" in US Chapter 11 cross-class cramdowns, which is intended to preserve liquidation priorities as between different types of stakeholders in a cramdown.

18 Despite the new provisions coming into force in 2020, there are no reported cases to date where the court has approved a scheme that crams down on an entire dissenting class of creditors.

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19 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 70(3)(*a*)–70(3)(*b*).
20 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(3)(c).
21 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(4)(*a*).
22 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(4)(*b*)(i).
23 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 70(4)(*b*)(ii).

III. Cross-class cramdowns in the UK

19 It is apposite at this juncture to turn to parallel developments in the UK, where cross-class cramdowns have also recently been introduced into the corporate rescue toolbox.

20 In June 2020, the Corporate Insolvency and Governance Act 2020[24] was introduced into UK law. This act amended the UK Companies Act 2006[25] by introducing the concept of a "restructuring plan" under a new Pt 26A. Restructuring plans are intended to operate alongside the existing statutory regimes for schemes of arrangement and company voluntary arrangements in the UK. For context, there are a few key differences between a UK restructuring plan and a scheme of arrangement under the Singapore framework:

(a) there is no headcount requirement in the creditor approval thresholds for a restructuring plan – instead, the approval threshold is just 75% in value of creditors voting in each class;

(b) a restructuring plan can bind creditors with no genuine economic interest in the debtor company, even if those creditors are excluded from voting on the restructuring plan;

(c) there is no absolute priority rule in a restructuring plan – senior creditors can be paid in full before a more junior class is paid; and

(d) as will be discussed below, a restructuring plan is able to vary rights of shareholders against their will (*ie*, a cramdown on shareholders) – a different policy direction was taken in Singapore, where our regime currently does not allow shareholder cramdowns.

21 More importantly for our purposes, a UK restructuring plan allows for a cross-class cramdown, through the new s 901G of the UK Companies Act 2006 (titled "sanction for compromise or arrangement where one or more classes dissent"). The UK court can now approve a restructuring plan that binds a dissenting class of creditors, if two conditions are met:

(a) Condition A is where the court is satisfied that, if the compromise or arrangement were to be sanctioned, no member of the dissenting class will be any worse off than they would be

24 c 12 (UK).
25 c 46 (UK).

in the event of the relevant alternative. The relevant alternative is whatever the court considers would be most likely to occur in relation to the debtor if the compromise or arrangement were not sanctioned.[26]

(b) Condition B is where the compromise or arrangement has been agreed by a number representing 75% in value of at least one class of creditors who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

22 Condition A has been described judicially as a "no worse-off" test. In *Re Virgin Active Holdings Ltd*,[27] Snowden J explained that:[28]

> The 'no worse off' test can be approached, first, by identifying what would be most likely to occur in relation to the [debtor companies] if the [restructuring plans] were not sanctioned; second, determining what would be the outcome or consequences of that for the members of the dissenting classes (primarily, but not exclusively in terms of their anticipated returns on their claims); and third, comparing that outcome and those consequences with the outcome and consequences for the members of the dissenting classes if the [restructuring plans] are sanctioned.
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> Having identified the relevant alternative scenario, the Court is also required to identify its consequences for the members of the dissenting classes. This exercise is inherently uncertain because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain. …

23 Although the UK cross-class cramdown regime is of the same vintage as that in Singapore, the UK courts have been kept comparatively busier with a line of judgments clarifying various aspects of their regime. While there are obvious differences between a Singapore and UK cross-class cramdown, it is suggested that the similarities between the regimes warrant consideration of the UK position. Section 901G of the UK Companies Act 2006 likewise draws inspiration from US Chapter 11 cramdown concepts. The underlying philosophy behind the UK regime's safeguards for dissenting classes, and its "no worse-off" test, also appears to be broadly in line with that in Singapore. Both UK and Singapore common law on corporate rescues also tap from broadly the same wellspring. With the above in mind, the burgeoning jurisprudence on UK restructuring plans may be a useful interpretive guide for Singapore.

26 Companies Act 2006 (c 40) (UK) ss 901G(3)–901G(4).
27 [2022] 2 BCLC 62.
28 *Re Virgin Active Holdings Ltd* [2022] 2 BCLC 62 at [106]–[108].

IV. Observations on the Singapore regime

A. Creditor classification

24 Turning back to Singapore, one of the reasons for introducing a cross-class cramdown mechanism was to lessen the importance of technical disputes on creditor classification, which often served as a chokepoint at an early stage of a scheme proceeding.

25 However, it is unlikely that disputes on creditor classification will recede into the background entirely. For example, if a debtor wants to invoke a cross-class cramdown, the debtor may now be motivated to fracture creditors into more classes than otherwise necessary. The purpose would be to artificially create at least one assenting class of creditors, to attempt to satisfy the jurisdictional requirement in s 70(1)(*c*) of the IRDA for cramming down other classes of dissenting creditors.[29]

26 The English High Court caught on to this exact scenario in *Re Virgin Atlantic Airways Limited*,[30] which was the first reported UK decision on a Pt 26A UK Companies Act 2006 restructuring plan. Ultimately, the debtor's restructuring plan was sanctioned and no cross-class cramdown was required. However, Snowden J observed that it appeared as though the debtor deliberately included three fully consenting classes of creditors in the restructuring plan, with a view to arguing that the cramdown powers in s 901G of the UK Companies Act 2006 would have been available, if a separate class of trade creditors voted against it. As the restructuring plan ultimately did not require a cross-class cramdown, Snowden J cautioned that his sanction should not be taken to mean that such tactical class formation was sufficient to meet the jurisdictional requirements for a cramdown. Likewise, Snowden J was careful to say that he was making no comment on how the inclusion of such classes should be assessed as a matter of discretion, when ultimately sanctioning the restructuring plan.[31]

27 Given the above, the court will still have to be vigilant to ensure that the debtor does not artificially fracture creditors into more classes for purely tactical reasons, and simply to meet the formal requirements in s 70(1)(*c*) of the IRDA. This vigilance will have to be applied at two stages: (a) when deciding whether to grant leave to hold scheme meetings;

29 *Ie*, the approval thresholds in ss 210(3AB)(*a*) and 210(3AB)(*b*) of the Companies Act 1967 being satisfied at the meeting of at least one class of creditors.
30 [2020] EWHC 2376 (Ch).
31 *Re Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch) at [47]–[50].

and (b) when considering whether to exercise the court's discretion to sanction the scheme.

B. Unfair discrimination between dissenting and assenting class

28 It is also quite likely that disputes on whether dissenting classes should be crammed down, which will arise at the sanction stage after creditors have voted on a scheme, will be equally (if not more) contentious and complex as disputes on creditor classification.

29 As discussed above, ss 70(3)(*a*) to 70(3)(*c*) of the IRDA confers the court with discretion to approve a scheme and bind all dissenting classes of creditors, as long as: (a) all creditors in totality (regardless of class) have approved the scheme by a majority in number, representing three-fourths in value of debt; and (b) the court is satisfied that the scheme does not "discriminate unfairly" between two or more classes of creditors, and is "fair and equitable" to each dissenting class.[32]

30 The first requirement above should be a purely arithmetical exercise, barring disagreements on weightage for related party votes, and disputes on whether debts were properly admitted. The new cross-class cramdown regime does not change the existing law on these matters. However, the second requirement, which requires an examination into the twin tests of fairness of discrimination as between classes, and fairness and equitability of the scheme for the dissenting class, can be a fertile battleground for litigation.

31 The IRDA is silent on when a scheme is deemed to "discriminate unfairly" between classes. In its responses to feedback during public consultations on the draft Companies (Amendment) Bill 2017, the Ministry of Law opted not to define the phrase "discriminate unfairly", preferring instead to give the court freedom to develop jurisprudence that would be suitable for the local context.[33] What is clear enough from the statutory language is that a debtor is allowed to discriminate between classes in its proposed scheme terms. This simply reflects the settled position that strict *pari passu* principles are not applicable in a corporate

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32 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 70(3)(*a*)–70(3)(*c*).

33 See Ministry of Law, "Ministry's Response to Feedback from Public Consultation on Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring" (27 February 2017) at para 8.2.2.

rescue scenario.[34] The issue will be exactly when discrimination between classes crosses the line from "fair" to "unfair".

32 On this note, the English High Court has observed in *Re Deep Ocean 1 UK Ltd*[35] that because UK cross-class cramdown provisions remove a class right of veto, justice requires the court to look at horizontal comparability. This is to see whether a restructuring plan provides for differences in the treatment of creditors, and if so, whether those differences are justified. In particular, the court will be concerned to ascertain whether there has been a fair distribution of the benefits of the restructuring (what some commentators call the "restructuring surplus"[36]) between classes who have agreed to the restructuring plan, and those who have not.[37] This also requires an inquiry into which class of creditors is bearing the costs of producing the restructuring surplus, and whether those costs are being adequately compensated for that class.

33 In *Re Great Annual Savings Co Ltd*,[38] Johnson J astutely explained why it was necessary for the court to examine fairness between classes in a restructuring plan[39]. Where a debtor seeks to invoke a cross-class cramdown, it was no longer a matter of imposing terms on a dissenting minority, whose interests are materially the same as those of the assenting majority within the same class. Instead, the cramdown required imposing

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34 See *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR(R) 834.

35 [2021] EWHC 38 (Ch) at [62]–[63].

36 See in particular, Dr Riz Mokal, "The Court's Discretion in Relation to the Pt 26A Cram Down" (January 2021) *Butterworths Journal of International Banking and Financial Law* 12, as cited with approval by Johnson J in *Re Great Annual Savings Co Ltd* [2023] 2 BCLC 78 at [104]. Dr Mokal explains that a restructuring surplus is the value sought to be preserved or created by the implementation of a corporate rescue plan. The plan typically seeks to create surplus through variations in or releases of existing rights against the debtor. Creditors affected by the plan contribute to this surplus through an adjustment or compromise of their rights. If creditors receive returns that exceed what they would have received if there was no plan, such excess returns are best understood as the payoff for creditors' contributions to the restructuring surplus. Accordingly, Condition A of a Pt 26A restructuring plan ensures that when a cross-class cramdown is sought, only the restructuring surplus is in play. If creditors in dissenting classes will get a restructuring surplus, they cannot complain that they should not be crammed down.

37 *Re Deep Ocean 1 UK Ltd* [2021] EWHC 38 (Ch) at [62]–[63]. See also Zacaroli J's remarks in *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2022] 1 BCLC 557 at [106]–[110] on the importance of vertical and horizontal comparators, in the context of unfair prejudice in a company voluntary arrangement. In *Re AGPS BondCo Plc* [2023] EWHC 916 (Ch) at [74], Leech J observed that Zacaroli J's approach was equally applicable when considering whether to sanction a cross-class cramdown in a s 901G restructuring plan.

38 [2023] 2 BCLC 278.

39 *Re Great Annual Savings Co Ltd* [2023] 2 BCLC 78 at [100]–[103].

terms on a dissenting class of creditors whose interests are so different to those of the assenting classes that they had to be grouped separately. If so, the traditional test of whether a compromise was one in which an intelligent man, being a member of the class concerned and acting in respect of his interests, would reasonably approve continues to be relevant for a traditional intra-class cramdown. However, that traditional test gives little insight on the inherent fairness of the plan to a dissenting creditor in a different dissenting class with very different interests.[40]

34 Johnson J went on to suggest, without being prescriptive, that overall fairness between dissenting and assenting classes can be assessed based on: (a) the existing rights of the creditors and how they would fall to be treated in the relevant alternative if the plan were not sanctioned; (b) what additional contributions they are expected to make to the success of the plan – and in particular whether they are taking on additional risk by making available "new money"; and (c) if they are disadvantaged under the plan compared to the relevant alternative, then whether the difference in treatment is justified.[41]

35 To operationalise the test, Johnson J noted that if the plan provides a fair distribution of the restructuring surplus to creditors, that would likely indicate that the negative vote of the dissenting class was not rationally motivated, which would support sanctioning the plan despite the dissent. The converse would also be true: if the distribution is not fair, that is likely to indicate that the dissenting class has voted rationally, and that would support the court refusing sanction. In some instances, strong overall support for a plan can also be an important discretionary factor.[42] If there are similarities between the positions of an assenting class and a dissenting class, the vote of the assenting class can help justify the conclusion that the dissenting class might rationally have supported the plan, and thus that it is a fair one overall.

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40 The Singapore court applies the same test at the sanction stage of a scheme of arrangement that does not feature any cross-class cramdown: see *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [70].

41 *Re Great Annual Savings Co Ltd* [2023] 2 BCLC 78 at [105].

42 That said, some caution should be exercised if inferences are being drawn on the strength of creditor support, based on turnout alone at creditors' meetings. As the English High Court has correctly observed, a lower turnout is usually expected from smaller trade creditors and other creditors who are "out of the money", as they may not have as much economic interest in the comparator: *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch) at [58], *per* Green J. This should not in itself suggest broad-based support or objections to the scheme.

36 The approach in *Re Great Annual Savings Co Ltd* (and similar cases[43]), which centres on how the debtor allocates its restructuring surplus, could be of some assistance for future Singapore cases on unfair discrimination between classes. For example, a scheme may well be unfairly discriminatory if it excludes an entire dissenting class from the scheme's restructuring surplus, without providing sufficient justifications for why assenting classes containing "out of the money", or senior or related-party creditors, are taking the benefit but not bearing the same burden. Such justifications could be if creditors in the assenting classes are taking on additional risks by providing new funds to the debtor, or if such creditors are also members who are providing sweat equity, or if such creditors are essential vendors or suppliers whose services are critical for the debtor's future ability to trade.[44] Consider also a scheme that requires the debtor's parent company to be released from its liabilities under a corporate guarantee. Such a release could be horizontally discriminatory to creditors in a dissenting class, but nonetheless fair on the grounds that an insolvent parent would undermine the debtor group's ability to operate post-restructuring.[45]

C. Fair and equitable to dissenting class

(1) Most likely scenario if scheme does not become binding

37 The IRDA does not spell out when a scheme is "fair and equitable" to a dissenting class. Instead, s 70(4) of the IRDA only provides that a scheme is *not* fair and equitable to a dissenting class, *unless* no creditor in the dissenting class receives, under the terms of the proposed scheme, an amount lower than what he is estimated by the court to receive in the most likely scenario if the scheme does not become binding.[46] The difficulty of double negatives aside, practitioners have astutely observed that the statute only sets out a baseline standard, and it is possible for the court to decide that a scheme is not fair and equitable to a dissenting class even if the baseline is exceeded.[47] This reading appears to be consonant with American interpretations of § 1129(b)(2) of the US Bankruptcy Code, which provides that a restructuring plan is fair and equitable with

43 In particular, see *Re Virgin Active Holdings Ltd* [2022] 2 BCLC 62 at [222]–[225]; *Re Houst Limited* [2022] BCC 1143 at [28]; and *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch) at [72]–[74].

44 *Re Houst Limited* [2022] BCC 1143, *per* Zacaroli J.

45 *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch) at [116]–[117], *per* Green J.

46 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 70(4)(*a*)–70(4)(*b*).

47 Mohan Gopalan, "Creditor Schemes of Arrangement and Dissenting Creditor Protection" (2018) 30 SAcLJ 902 at para 32.

respect to a dissenting class if it "includes" a non-exhaustive baseline of requirements for secured and unsecured creditors.

38 However, even taking the baseline standard alone, there will almost certainly be room for debate on what the "most likely scenario" ought to be if the scheme does not become binding. This determination is important, because the comparison of amounts that the dissenting creditor will receive depends on what the most likely alternative scenario, or comparator, the scheme returns should be compared against.

39 For context, § 1129(7) of the US Bankruptcy Code provides that the comparator for a cross-class cramdown is the amount that a creditor would receive if the debtor were *liquidated*. The Bankruptcy Code does not admit of any other comparator except liquidation. During consultations on the draft Companies (Amendment) Bill 2017, the Ministry of Law accepted public feedback to amend the comparator under s 211H(4)(*a*) of the draft Bill[48] to a more open-ended outcome of what would happen if the scheme was not passed, as opposed to liquidation being the sole comparator.[49] Accordingly, in Singapore and the UK,[50] the comparator is not necessarily liquidation. Instead, it is open to dissenting creditors to argue a wider universe of alternative likely scenarios.

40 To play this out, the debtor's options if a scheme does not become binding will often hinge on whether it will still enjoy a moratorium against proceedings and enforcement. If the moratorium is lifted, and creditors are already at the debtor's doors with winding-up applications, the appropriate comparator may well be the debtor's insolvent liquidation. Conversely, if creditors wish to replace the debtor's management but are willing to allow the debtor to carry out a controlled wind-down with some moratorium protections, another possible comparator could be a holding state like judicial management under Pt 7 of the IRDA. However, the court needs to be satisfied on the "most likely" scenario, and not just a likely or possible scenario. If so, will the threshold then import a mini-hearing on whether the statutory purposes of judicial management will be met, into an already complex hearing on cross-class cramdowns?

48 Which is now s 70(4)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018.

49 See Ministry of Law, "Ministry's Response to Feedback from Public Consultation on Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring" (27 February 2017) at para 8.3.1.

50 For a brief account of how UK legislators also rejected a proposal for liquidation to be the only comparator in s 901G of the UK Companies Act 2006, and opted instead to keep the relevant alternative as an open-ended one to be determined by the UK High Court, see *Re Virgin Active Holdings Ltd* [2022] 2 BCLC 62 at [243]–[246].

41 There will also be cases where the debtor has a longer runway before liquidation or judicial management is imminent. For example, it is conceivable that a debtor's projected cashflows may actually be capable of sustaining different returns to dissenters, without the need for a scheme featuring a cross-class cramdown. If push came to shove, the debtor's senior creditors or financiers may also be willing to provide liquidity and indulgence, even if the proposed scheme is not sanctioned. If so, the most likely scenario if the scheme does not become binding may not necessarily result in a lesser amount for the dissenter. The debtor might therefore not be able to satisfy the "fair and equitable" requirement in s 70(4) of the IRDA. Indeed, the English High Court in *Re Hurricane Energy plc*[51] declined to approve a s 901G cramdown, as there was enough evidence that the debtor's alternative scenario (of a controlled wind-down with trading for at least a year) could provide better returns to dissenters than its restructuring plan.

42 Debtors will therefore have to tread a careful path between applying too early for cross-class cramdown reliefs, *versus* facing a different risk entirely if they decide to wait and see if their financial situation improves. That said, some caution needs to be exercised when facing arguments that the debtor's most likely scenario is not as bleak as the debtor claims. Why should a debtor be penalised for taking early and proactive steps to restructure its debts, before it irreversibly approaches the cliff of insolvent liquidation?

43 Whatever the case, it would be in the debtor's interests to advance a comparator that predicts the worst possible returns for dissenting creditors. By doing so, the projected returns to dissenters in the proposed scheme can be window-dressed to look more attractive than the more dire alternative, thereby satisfying the formal requirements of s 70(4)(*a*) of the IRDA. If so, this will lead to the difficulty of sieving out when debtors and senior, secured or related-party creditors are possibly colluding to present a more dire likely scenario, if the scheme does not become binding.

44 On this point, the English High Court has accepted that the debtor's directors are normally in the best position to identify what will happen if a scheme fails. Where the evidence appears on its face to reflect a rational and considered view of the debtor's board, the court will require sufficient reasons for doubting that evidence.[52] However, how far does this principle extend if the debtor's directors are cynical and self-

51 [2021] EWHC 1759 (Ch).
52 *Re ED&F Man Holdings Ltd* [2022] EWHC 687 (Ch) at [39], *per* Trower J.

interested, but not to the point that their decision cannot be explained away as a genuine commercial one?

45 This question arose for consideration in *Re Nasmyth Group Ltd*.[53] In that case, Leech J accepted that there was considerable force in a dissenting creditor's argument that insolvent administration was not the correct comparator. The dissenter gave evidence that the debtor would continue to be financed by the debtor's related entity, and that the debtor's management had themselves previously made representations of a much rosier outlook. Significantly, after the dissenter concluded its oral arguments, the debtor's board of directors appeared to engineer a *fait accompli*, by promptly passing resolutions to place the debtor into insolvent administration if the restructuring plan (with cramdown) was not sanctioned.

46 Justice Leech stated that his immediate reaction was to agree that the board's decision was cynical and transparent, and intended to hold a gun to the head of the court. However, Leech J was unable to conclude that the debtor's decision was not a genuine view held by its directors. The debtor therefore proved to the civil standard of probabilities that insolvent administration was the appropriate comparator, despite the understandable doubts cast over its intentions. It is humbly submitted that this is not the most palatable outcome. The debtor's subjective beliefs about insolvent administration can only be ascertained by examining objective facts and conduct. The uncanny timing of the directors' resolutions, and the paucity of reasons supporting their sudden decision, are all objective facts that point equally to a certain level of gamesmanship in the directors' decision, which appears calculated to force the court in one direction.[54]

47 In the Singapore context, it is suggested that if there are real doubts on the *bona fides* of the likely scenario advanced by a debtor if its scheme does not become binding, the court can ultimately exercise its discretion not to sanction the scheme. Section 70(2) of the IRDA only states that the court "may" approve the scheme if the conditions for a cross-class cramdown are satisfied, and does not mandate the court to do so.

53 [2023] EWHC 988 (Ch).

54 For an example of a case where the debtor's reasons for its alternative scenario, being an administration with a pre-packed sale, were more commercially plausible, see *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch).

(2) Amount that creditors in dissenting class are estimated by court to receive

48 It is somewhat unfortunate that the test of fairness and equitability in s 70(4)(*a*) of the IRDA is focused only on the "amount" that a creditor in the dissenting class is estimated by the court to receive, in the most likely scenario if the scheme does not become binding. On a literal reading, the word "amount" suggests that the court should only be concerned about a liquidated monetary sum that the dissenting creditor is estimated to receive in the most likely scenario, if the scheme is not sanctioned. This of course poses no issues if the most likely scenario is liquidation, since liquidation is designed to result in cash dividends to creditors if there are assets available.

49 However, as discussed above, the comparator in s 70(4)(*a*) of the IRDA is not necessarily liquidation. If a debtor still has runway with sufficient cashflow, it is conceivable that a debtor could sustain a different repayment plan involving payments other than cash (*eg*, assignments of receivables, transfers of property or shares, debt-equity swaps or options, convertible notes, *etc*), if the scheme does not become binding. The quality, realisability, future value and time frame of these potential cash and non-cash returns will be equally important factors that creditors will weigh, when considering if they will be worse off under the scheme. Accordingly, focusing only on an "amount" that the court estimates a creditor in a dissenting class to receive in the most likely scenario, may not fully capture the commercial value of non-cash or deferred recovery to that dissenter if the likely scenario is not liquidation.

50 The UK regime deals with this issue more neatly. Sections 901G(3) and 901G(4) of the UK Companies Act 2006 simply require the court to assess if any creditor in a dissenting class will be "worse off" than they would be, compared to what would most likely occur if the compromise or arrangement were not sanctioned. In *Re Deep Ocean 1 UK Ltd*, Trower J explained that the phrase "any worse off" is:[55]

> … a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay.

The UK courts are therefore not limited to comparing only the "amount" that the creditor is estimated to receive under the restructuring plan or the comparator.

55 *Re Deep Ocean 1 UK Ltd* [2021] EWHC 38 (Ch) at [35].

51 In the circumstances, it appears that the reference to "amount" in s 70(4) of the IRDA might be a vestigial holdover from its origins in § 1129(7) of the US Bankruptcy Code,[56] which was not updated when the Ministry of Law accepted feedback that the comparator could be a scenario other than liquidation.

52 Notwithstanding, it is humbly suggested that the legislative purpose of s 70(4) of the IRDA must be to allow the court to compare whether a creditor in a dissenting class will be commercially better or worse off under the proposed scheme, than under the comparator. If so, the court should be concerned with the dissenter's point of view, assuming an honest and intelligent dissenter acting rationally and with a view to his commercial interests. It is therefore humbly submitted that a purposive interpretation of s 70(4) of the IRDA will allow the word "amount" to admit a meaning wider than a mere liquidated monetary sum, and to include all other incidents commercially relevant to the dissenter's claims against the debtor under the comparator if the scheme is not sanctioned.

53 As an aside, s 70(4)(*b*)(ii) of the IRDA also contemplates that a scheme is not fair or equitable for an unsecured creditor in a dissenting class, if junior or subordinate creditors receive or retain any of the debtor's property. However, the IRDA does not say that this same scenario also constitutes unfair discrimination against the dissenting class. It is unclear if this suggests that the threshold for unfair discrimination is intended to be lower than that for a fair and equitable scheme, if the discrimination is in the form of returns for a more junior class. On balance, it is suggested that such a conclusion should not be drawn. One concept deals with a horizontal comparison across classes, while the other deals with the scheme's fairness to the dissenter when viewed on its own.

(3) Valuations

54 Another major issue is how the court is supposed to compare the returns that creditors in the dissenting class will receive, if the scheme becomes binding *versus* the most likely scenario if the scheme does not. This difficulty was foreshadowed in the ILRC's 2013 Final Report, where the ILRC acknowledged that cramdown provisions will rely on comparative valuations between rescue and liquidation, which are often speculative or in some cases nuanced to make rescue sound more attractive. However,

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56 § 1129(7) of the US Bankruptcy Code requires the court to consider whether each holder of a claim in a class to be crammed down "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain *if the debtor were liquidated* under chapter 7 of this title on such date …" [emphasis added].

the ILRC considered that there were adequate checks against abuse, as dissenting creditors were free to produce alternative valuations, and to engage experts to challenge a scheme manager's valuation.[57]

55 Similar views were expressed during consultations on what would eventually become Pt 26A of the UK Companies Act 2006. In its response to consultations on insolvency and corporate governance reform, the UK Department for Business, Energy & Industrial Strategy stated that:[58]

> Many respondents noted how contentious valuation can be, both in the UK's schemes of arrangement and the US's Chapter 11 proceedings. The Government acknowledges that disputes over valuation may result in costs and delay to restructuring plans being confirmed or not. The responses received indicate that it is highly unlikely that any standard chosen would completely remove the potential for dispute given the importance of the valuation in determining who may be crammed down. Even if a straightforward option, such as liquidation value, was used, that would not eradicate the possibility of creditors challenging a valuer's assessment based on factors such as valuation method employed. As a number of respondents pointed out, there are many valuation methods in common use so there will be different opinions as to which is the most appropriate, and creditors can challenge if they do not agree with the company's choice …

56 Accordingly, the common thread in the UK and Singapore is that valuations can be a contentious but ultimately workable mechanism. Commentators have also suggested that the mere potential for dissenters to bring a challenge on valuations could incentivise parties to reach a negotiated settlement, so as to avoid litigation risks and to save costs.[59]

57 While s 70(5) of the IRDA allows the court to appoint an expert to assist in valuation, it still remains the case that valuation can be a fraught exercise based heavily on assumptions, projections and imperfect information provided by the debtor. As the US court held in *Re Mirant Corp*:[60]

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57 Insolvency Law Review Committee, *Final Report* (2013) (Chairman: Lee Eng Beng SC) at paras 50–51.

58 *Insolvency and Corporate Governance: Government Response* (Department for Business, Energy & Industrial Strategy, 26 August 2018) at para 5.172 <https://www.gov.uk/government/consultations/insolvency-and-corporate-governance> (accessed 29 December 2023).

59 Gerard McCormack & Wai Yee Wan, "Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges" (2018) *Journal of Corporate Law Studies* at p 23.

60 334 BR 800, 848 (Bankr ND Tex, 2005). Cited in *Commission to Study the Reform of Chapter 11: Final Report and Recommendations* (American Bankruptcy Institute, 2014) at p 181.

> [T]he valuation of an enterprise … is an exercise in educated guesswork. At worst it is not much more than crystal ball gazing. There are too many variables, too many moving pieces in the calculation of value … for the court to have great confidence that the result of the process will prove accurate in the future. Moreover, the court is constrained by the need to defer to experts and, in proper circumstances, to Debtors' management. …

58 The deference that the court necessarily needs to give to the debtor's information and projections means that creditors will usually be at a significant disadvantage in a valuation dispute. Indeed, the case law on minority oppression and buyouts by shareholders is indicative. It is difficult for a litigant who is not part of management to engage in a valuation dispute on an even footing, unless he has the same access to financial information and management accounts as a director.

59 To illustrate this difficulty, creditors in the dissenting class in *Re Virgin Active Holdings*[61] complained that they were prevented from preparing their own competing valuations, as the debtor allegedly excluded dissenters from negotiations on the restructuring plan, and were uncooperative with providing information and documents. Snowden J accepted that the dissenters were provided with information later than they would have liked. However, Snowden J held that he could not, as a matter of principle, do anything other than assess the restructuring plans based on the valuation evidence before him. Snowden J's judgment also suggests that the onus is on dissenting creditors to apply to court for disclosure, if they were dissatisfied with the debtor's documents.

60 Subsequently in *Re Smile Telecom Holdings Ltd (No 2)*,[62] Snowden LJ established what looks to be a worryingly high bar for dissenters to meet:[63]

> Put simply, if a creditor or member wishes to oppose a scheme or plan based upon a contention that the company's valuation evidence as to the outcome for creditors or members in the relevant alternative is wrong, they must stop shouting from the spectators' seats and step up to the plate. The creditor or member should obtain any financial information from the company that may be required, either on a voluntary basis or by making a timely disclosure application; file expert evidence of its own, instruct the expert to engage in the production of a joint report in the normal manner, and tender the expert for cross-examination. They should also attend the hearing and address argument for the assistance of the court at the appropriate stage in the process at which the point is to be determined. …

61 [2022] 2 BCLC 62 at [118]–[132].
62 [2023] 1 BCLC 352.
63 *Re Smile Telecom Holdings Ltd (No 2)* [2023] 1 BCLC 352 at [53].

61 The above statements will be concerning to a dissenting creditor. The sheer cost and complexity of a valuation dispute[64] is one of the best illustrators of the free-rider problem endemic to any restructuring and insolvency situation. Why should one dissenter bear the costs, risks and trouble of fronting a valuation dispute, when any benefits from succeeding will only be diluted amongst passive dissenters? While the English High Court is prepared to grant costs orders to compensate dissenters who take such steps to assist the court,[65] there is no guarantee that costs will be granted, or that the debtor will be able to satisfy such an order. Unless the stakes justify such expenses, a dissenter might be better off concentrating its resources on challenging the debtor's choice of classification, its most likely scenario, or the horizontal and internal fairness of the proposed scheme.

62 In a welcome development, the English High Court in *Re Great Annual Savings Co Ltd*[66] has since clarified that Snowden LJ did not intend to lay down an invariable rule in *Re Smile Telecom Holdings Ltd (No 2)* that the court is bound to accept the debtor's valuation analysis, if the opposing party does not adduce expert evidence. Instead, Johnson J held that the real issue is whether the debtor has discharged its own legal burden in proving that the dissenter will not be worse off. The dissenter only bears an evidential burden of providing a factual basis for his challenge. This can be done with or without an opposing expert report. The question will then be whether the debtor can refute that challenge and prove its position on the balance of probabilities. On the facts, Johnson J declined to sanction the cramdown as he was not persuaded by the robustness of the debtor's valuation report. In particular, Johnson J found that the expert's conclusions that certain assets should be written off were based solely on information and figures provided by the debtor, with no independent scrutiny or analysis on whether the representations were correct.

63 It is submitted that Johnson J's reasoning on the relevant burden of proof for valuations is sound,[67] and compatible with the Singapore regime for cross-class cramdowns. For practitioners, the takeaway from *Re Great Annual Savings Co Ltd* is that the reliability of the debtor's valuations will be especially critical, if the difference between the amount that a dissenter will receive under a scheme and under the most likely

64 For an example of how involved and complex a valuation dispute can be in a cross-class cramdown, see *Re AGPS BondCo plc* [2023] EWHC 916 (Ch).

65 See, *eg*, the interim costs judgment in *Re Virgin Active Holdings Ltd (No 2)* [2021] EWHC 911 (Ch).

66 [2023] 2 BCLC 278.

67 See also *Re Amicus Finance plc* [2022] BLR 86 at [56], *per* Norris J, for a similar decision on burdens of proof.

scenario is not large. This is because if the assumptions are even slightly wrong, there is very little room to say that the dissenter will receive a higher amount under the scheme than under the comparator.

D. Cramdown on members

64 One major difference between US Chapter 11 and UK restructuring plan regimes on the one hand, and cross-class cramdowns under s 70 of the IRDA on the other, is that the Singapore regime does not yet allow members' rights to be compulsorily varied to support a corporate rescue. Unlike a US Chapter 11 cramdown, a scheme featuring a cross-class cramdown can also be sanctioned in Singapore, without requiring members to give up their equity in the debtor.

65 During consultations on the draft Companies (Amendment) Bill 2017, the Ministry of Law was aware of concerns that shareholders could potentially veto a scheme by withholding consent to certain corporate actions that would be necessary for a more complex scheme. The Ministry stated that in its response to public feedback that the proposed cross-class provisions in the Bill would nevertheless protect dissenters sufficiently, by ensuring that shareholders do not receive property ahead of the dissenting class.[68] The cross-class cramdown powers that were initially introduced in the Companies (Amendment) Act 2017 provided that a scheme was not fair and equitable to a creditor in a dissenting class, if any creditor or member subordinate to the dissenter received or retained any "property" on account of the claim, or the member's interest.[69]

66 Practitioners subsequently pointed out that it was difficult to operationalise such a cramdown. "Property" would conceivably include shares in the debtor and all rights accruing thereto, and there were no express provisions in the IRDA that allowed the court to override or extinguish members' shareholding rights in a corporate rescue scenario.[70] Accordingly, when the cross-class cramdown provisions in the Companies Act were later ported over into the IRDA, the successor provision in s 70(4)(*b*)(ii)(B) of the IRDA was amended to clarify that

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68 See Ministry of Law, "Ministry's Response to Feedback from Public Consultation on Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring" (27 February 2017) at para 8.2.2.

69 See s 22 of the Companies (Amendment Act) 2017, which inserted s 211H(4)(*b*)(ii)(B) into the Companies Act.

70 Paul Apathy, Emmanuel Duncan Chua & Rowena White, "Singapore's New 'Omnibus' Insolvency, Restructuring and Dissolution Bill" *Singapore Law Gazette* (January 2019) <https://lawgazette.com.sg/feature/singapores-new-omnibus-insolvency-restructuring-and-dissolution-bill/> (accessed 29 December 2023).

the restriction was only against junior creditors or members receiving or retaining "property *of the company*" [new words inserted in italics]. This departure from the absolute priority rule confirms that a scheme can be fair and equitable to a dissenting class, even if members continue to retain their equity interests in the debtor.[71]

67 There is a sentiment amongst some commentators that our cross-class cramdown regime could and should have gone further to allow member cramdowns.[72] The general philosophy in regimes that allow member cramdowns is that members are indubitably "out of the money" in most instances, as they have the lowest priority in any liquidation of the debtor. If so, the theory is that members should not be allowed to block a viable but more complex corporate restructuring plan that requires member consents, if the proposed compromise will bring a restructuring surplus to creditors. Such member consents could relate to, *eg*, a scheme that requires equity interests to be adjusted by the issuance, transfer or cancellation of shares, convertible notes, debt-equity swaps, or the substantial disposal of business and assets to a new "phoenix" entity.

68 Seen from another angle, a corporate rescue that has succeeded due to creditors' sacrifices may result in an unfair windfall for members, if the members retain their full equity and contribute nothing to the rescue. Why should creditors then bear all the costs of bringing about the restructuring surplus?

69 It is beyond the scope of this article to consider the normative question of whether member cramdowns should be introduced in Singapore, and if yes, what safeguards should be built in. Notwithstanding, this author ventures to suggest that it is difficult, and perhaps inappropriate, to completely restrict "out of the money" members from retaining or getting new benefits in a scheme.

70 It is true that members have the lowest priority, if a scheme is not sanctioned and the debtor is placed into insolvent liquidation. However, it does not follow that members must therefore be subordinated or expropriated in a corporate rescue. Why is a member's liquidation priority even an appropriate baseline for comparison? Liquidation is about distributing present assets on a *pari passu* basis, while a corporate

71 The Singapore model therefore departs from the "absolute priority" rule in US Chapter 11 cramdowns, which allows for expropriation of shareholdings. See, *eg*, Wee Meng Seng & Hans Tjio, "Singapore as International Debt Restructuring Center: Aspiration and Challenges" (2021) 57(1) *Texas International Law Journal* 1 at 21.

72 See, *eg*, for example K Teo Chuanzhong, "A Critical Evaluation of the New Cramdown Tool in Singapore's Restructuring Regime" (2021) 30(2) Int Insolv Rev 1.

rescue is meant to create restructuring surplus and future assets for as many stakeholders as possible.[73] The two processes are fundamentally different in intent and in its legal mechanisms.

71 There is also the practical issue of a scheme being a debtor-in-possession regime. Majority shareholders who disagree with the debtor's proposals for a member cramdown can simply change the board of directors to a more pliant one, thus neutralising the threat of a member cramdown. The considerations may be different for debtors with a wider base of shareholders (*eg*, listed or public entities), but the threat of minority shareholders potentially alleging oppression in a member cramdown cannot be ruled out.

72 More importantly, the success of a post-restructuring debtor often hinges on the continued participation and buy-in of members. Such members are also often the debtor's management and their key persons, with important personal connections with vendors and customers, or whose business model is built on their skills and personalities. As practitioners will have experienced, most successful cases of debtor-in-possession restructuring involve members who have remained firmly committed to the debtor, and who have either willingly given up shares, or have contributed fresh funds via debt or equity injections. In a corporate rescue scenario where the goal is to create restructuring surplus, it is unrealistic to expect members to not receive compensation for their efforts and commitment (whether through "sweat equity" or actual fresh equity).

73 Given the above, any future law reform on member cramdowns will require a fundamental and holistic review of creditors' and members' rights in a corporate rescue scenario.

V. Final thoughts

74 Given the lively UK experience for Pt 26A restructuring plans, and the remarkable willingness of the Singapore insolvency Bench and Bar to constantly test out new solutions when a framework is made available, it is somewhat surprising that there is still no reported Singapore judgment

73 See Stephen Madaus, "Reconsidering the Shareholders' Role in Corporate Reorganisations under Insolvency Law" (2013) 22(2) *International Insolvency Review* 106 for a useful comparative perspective on shareholder treatment in corporate rescues.

on a cross-class cramdown. It is hoped that this article will one day be of some assistance for that first benchmark decision.